

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

10/10/2002

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2002-000091

FILED: _____

STATE OF ARIZONA

BARTON J FEARS

v.

TIMOTHY LEE COOK

JAY L CIULLA

FINANCIAL SERVICES-CCC
PHX CITY MUNICIPAL COURT
REMAND DESK CR-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #5853915

Charge: DUI

DOB: 12/06/48

DOC: 03/09/01

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement since the time of oral argument and this Court has considered that argument,

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reviewed the record of the proceedings from the Mesa City Court, exhibits made of record and the Memoranda submitted by counsel.

On March 9, 2001, Appellant was arrested in the City of Phoenix and charged with Driving While Under the Influence of Intoxicating Liquor. Prior to trial Appellant filed a Motion to Suppress all evidence which was the fruit of an alleged unreasonable stop, Appellant claimed the police did not have a reasonable suspicion to stop his vehicle. The trial court conducted an evidentiary hearing on Appellant's motion. The trial judge denied Appellant's Motion to Suppress.

Appellant claims that the trial court erred in failing to suppress all evidence gathered after an unreasonable stop of Appellant. Appellant claims that the Phoenix Police Officers did not have a "reasonable suspicion" which would justify the stop of Appellant's vehicle. An investigative stop is lawful if the police officer is able to articulate specific facts which, when considered with rational inferences from those facts, reasonably warrant the police officer's suspicion that the accused had committed, or was about to commit, a crime.¹ These facts and inferences when considered as a whole the ("totality of the circumstances") must provide "a particularized and objective basis for suspecting the particular person stopped of criminal activity."² A.R.S. Section 13-3883(B) also provides in pertinent part authority for police officers to conduct a "investigative detention":

A peace officer may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of any traffic law committed in the officer's presence and may serve a

¹ Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); State v. Magner, 191 Ariz. 392, 956 P.2d 519 (App. 1998); Pharo v. Tucson City Court, 167 Ariz. 571, 810 P.2d 569 (App.1990).

² United States v. Cortez, 449 U.S. 411, 417-18, 101 S.Ct. 690, 695, 66 L.Ed.2d 621, (1981).

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copy of the traffic violation.

A temporary detention of an accused during the stop of an automobile by the police constitutes a "seizure" of "persons" within the meaning of the Fourth Amendment even if the detention is only for a brief period of time.³ In Whren⁴ the United States Supreme Court upheld the District's Court denial of the Defendant's Motion to Suppress finding that the arresting officers had probable cause to believe that a traffic violation had occurred, thus the investigative detention of the Defendant was warranted. In that case, the police officers admitted that they used the traffic violations as a pretext to search the vehicle for evidence of drugs. The Court rejected the Defendant's claim that the traffic violation arrest was a mere pretext for a narcotic search, and stated that the reasonableness of the traffic stop did not depend upon the actual motivations of the arresting police officers. Probable cause to believe that an accused has violated a traffic code renders the resulting traffic stop reasonable under the Fourth Amendment.⁵

The sufficiency of the legal basis to justify an investigative detention is a mixed question of law and fact.⁶ An appellate court must give deference to the trial court's factual findings, including findings regarding the witnesses' credibility and the reasonableness of inferences drawn by the officer.⁷ This Court must review those factual findings for an abuse of discretion.⁸ Only when a trial court's factual finding, or inference drawn from the finding, is not justified or is clearly against reason and the evidence, will an abuse of

³ Whren v. United States, 517 U.S. 806, 809-810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

⁴ Id.

⁵ Id.

⁶ State v. Gonzalez-Gutierrez, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); State v. Magner, supra.

⁷ Id.

⁸ State v. Rogers, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996).

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discretion be established.⁹ This Court must review *de novo* the ultimate question whether the totality of the circumstances amounted to the requisite reasonable suspicion.¹⁰

In this case, the trial judge denied Appellant's Motion to Suppress, stating:

Counsel, thank you both for your presentation, for the witnesses that you've called. The Court has considered the evidence and the testimony that's been presented. The court is going to find that the officer did have a reasonable suspicion to stop the vehicle. The stop was warranted based upon his observations. The Motion to Suppress will be denied at this time.¹¹

The trial judge's legal conclusions are supported by the testimony of Phoenix Police Officer, Rodney French. Officer French testified that his attention was drawn to Appellant's vehicle by the manner in which Appellant made a right-hand turn at such a speed so as to cause the tires of his car to "scuff" against the road.¹² Officer French then noted that Appellant was braking his automobile in a "jerky" manner to slow its speed.¹³ Officer French also noticed that Appellant's vehicle drifted toward the right of the lane and then jerked the car back into the center of the lane.¹⁴ The officer characterized the driving corrections and over-corrections made by the Appellant as above normal.¹⁵

⁹ State v. Chapple, 135 Ariz. 281, 297, 660 P.2d 1208, 1224 (1983); State v. Magner, 191 Ariz. at 397, 956 P.2d at 524.

¹⁰ State v. Gonzalez-Gutierrez, 187 Ariz. at 118, 927 P.2d at 778; State v. Magner, 191 Ariz. at 397, 956 P.2d at 524.

¹¹ R.T. of February 7, 2002, at page 51.

¹² Id., at page 29.

¹³ Id., at pages 29-30.

¹⁴ Id., at pages 30-31.

¹⁵ Id., at page 46.

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This Court determines that a factual basis exists to support the trial judge's ruling in denying Appellant's Motion to Suppress. Further, this Court determines *de novo* that these facts do establish a reasonable basis for Phoenix Police Officer French to have stopped the automobile driven by the Appellant.

The next issue raised by the Appellant concerns the admission by the trial judge of the testimony of Officer French concerning the National Highway Transportation and Safety Agency Nighttime Driving Studies ("NHTSA" studies). Officer French was asked about the NHTSA studies and its findings that there are certain cues of impairment that are consistent with impairment by alcohol. This line of questions was not objected to by Appellant or his attorney.¹⁶ Officer French was asked a number of questions about his knowledge and ability to observe cues of impairment from alcohol intoxication.¹⁷ The prosecutor asked Officer French, "when the driving that you have initially observed the Defendant engage in, the reason that you conducted the traffic stop, are any of those driving behaviors covered by NHTSA?"¹⁸ At that point, Appellant's counsel objected on the basis of hearsay. The trial judge overruled that objection and permitted Officer French to testify to those Nighttime driving cues established by NHTSA that evidence alcohol impairment.¹⁹ Officer French then proceeded to describe several of the 24 nighttime driving cues of impairment and discussed his understanding of those cues.²⁰

Though Appellant contends the officer's testimony about the NHTSA Nighttime Driving Cues in the NHTSA Studies are hearsay, this Court disagrees. Hearsay is defined in Rule 801, Arizona Rules of Evidence as:

"Hearsay" is a statement, other than

¹⁶ R.T. of February 8, 2002, at page 102.

¹⁷ Id., at pages 105-117.

¹⁸ Id., at page 116.

¹⁹ Id.

²⁰ Id., at page 117.

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one made by the declarant while testifying
at the trial or hearing, offered in evidence
to prove the truth of the matter asserted.

The truth of the NHTSA Studies are irrelevant because Officer French explained that the NHTSA Studies were part of his training and that he continues to rely upon those studies while performing his job. Whether those studies are correct or incorrect is irrelevant to Officer French's testimony. He utilized the NHTSA "cues" in determining whether to make a traffic stop of Appellant's vehicle, and, later, to arrest Appellant. Thus, the NHTSA Studies were not offered "to prove the truth of the matter asserted." Evidence of the NHTSA Studies, as referenced by Officer French, were admissible to explain Officer French's actions on the night he arrested the Appellant.

This Court finds no error.

IT IS ORDERED affirming the judgment of guilt and sentence imposed by the Phoenix City Court.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for all further and future proceedings in this case.